STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

NANCY BROWN,

Plaintiff,

Case No. 2005-1970-CK

and

NATIONSRENT and Joseph Burlingame, III,

Intervening Plaintiffs,

vs.

FARM BUREAU INSURANCE GENERAL INSURANCE COMPANY OF MICHIGAN, a Michigan corporation,

Defendant.

_____/

OPINION AND ORDER

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Intervening plaintiff NationsRent also moved for summary disposition under MCR 2.116(C)(10); intervening plaintiff Joseph Burlingame concurred.

Plaintiff filed a complaint for declaratory relief on May 18, 2005, against defendant insurance company on the grounds that defendant refused to defend plaintiff according to the policy's provisions, following an accident on plaintiff's property whereby an injury was sustained by a third party, and plaintiff was subsequently sued. Joseph Burlingame was granted status as intervening plaintiff November 21, 2005, as the injured third party, alleging that on March 10, 2005, Burlingame was injured by a forklift that was being operated by plaintiff's son, Jason Brown, on plaintiff's property. The

forklift was leased through NationsRent by plaintiff. Burlingame has a lawsuit pending in Sanilac County against NationsRent, and as such, has an interest in whether plaintiff has insurance proceeds available to resolve his Sanilac County claim in which a judgment may be rendered.

NationsRent filed an intervening complaint on October 31, 2005, requesting declaratory judgment against defendant insurance company under the provisions of plaintiff's homeowner's insurance policy.

The Court will address and decide both motions for summary disposition herein.

Standard of Review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim, while a motion under MCR 2.116(C)910) tests the factual support for a claim. *Rorke v Savoy Energy, LP,* 260 Mich App 251, 253; 677 NW2d 45 (2003). Granting a motion pursuant to subrule (C)(8) is proper when the opposing party has failed to state a claim on which relief can be granted, the claim is clearly unenforceable as a matter of law, and no factual development could support recovery. *Id.* When reviewing such a motion, only the pleadings are considered; no documentary evidence may be examined.

In contrast, when considering a motion under subsection (C)(10), the court must consider the pleadings and all documentary evidence, including affidavits and depositions, in the light most favorable to the nonmoving party in order to determine if the moving party is entitled to a judgment as a matter of law. *Id.* The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, and the disputed factual issue must be material to the dispositive legal claims. *State Farm v Johnson,* 187 Mich App 264, 267; 466 NW2d 287 (1990).

The Court must consider all pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004).

Factual Background

According to Joseph Burlingame's deposition testimony, age 18 at the time of the accident, he had been dating plaintiff's 16-year-old daughter prior to the accident. While at the Brown's house during a vacation period Burlingame had, plaintiff asked him if he was interested in doing some work in Ubly, in the "Thumb" area of Michigan on some property she owned. Burlingame stated he was told "they were going to drop off the barn." He was also told they had rented a forklift for the work that plaintiff's son Jason, age 18 at the time of the accident, was going to operate. Not too long prior to the incident, Burlingame had operated a front-end loader to pull a vehicle out of the mud on plaintiff's property. He stated that on the day of the accident, plaintiff drove Jason and him up to the property, and when they arrived, the two trailer trucks were already there that needed to be unloaded, along with the rented forklift.

Regarding Burlingame's responsibility, he understood that he was just going to make sure that Jason got in the right area with the forklift to lift the steel off the trucks, while standing on the bed of the truck. Initially they could not get the forklift started, and had to jump-start it using cables attached to plaintiff's car. Burlingame had found operating manuals in the cab of the forklift, but could not find any information about starting the vehicle, so handed the manuals to plaintiff. He stated the only purpose in looking at the manuals was to learn how to start the forklift, not for any information regarding rules for safe operation.

The work took between 3 and 4 hours to complete, and at no time did Burlingame ever operate the forklift. He stated Jason practiced operating the forklift and boom for a few minutes prior to beginning the actual work. Burlingame's job was to stand on the truck trailer and guide the forks underneath the steel and similar materials so they could be lifted off. He stated that during the process of removing the materials from the trucks, nothing Jason did gave rise to the notion that he did not know how to operate the forklift, as all went smoothly. After both trucks had been unloaded and had left the scene, it is alleged plaintiff had asked if they were going to go for a ride on the forklift around the property. Upon plaintiff's suggestion, Burlingame stated he and Jason together decided to go for a ride.

Burlingame then climbed on the front of the forklift, next to the cab, under the boom, while Jason was in the driver's seat in the cab driving the forklift around the property. In its normal position, were Burlingame not sitting where he was, that spot was where the boom would have rested, had it been in the lowered position. They were driving around for 10 or 15 minutes until they got stuck in some mud, and the vehicle came to a halt. At that point, the boom came down, pinning Burlingame between the boom and vehicle, in a forward leaning position. Jason then raised the boom from the driver's seat, got out and came around front to where Burlingame was still positioned. Burlingame stated he could not move his legs, so he put his arms around Jason's chest, and Jason lifted him off the forklift, placed him on the ground and summoned help. As of the date of deposition taking, Burlingame is paralyzed from the waist down as a result of this accident.

Plaintiff stated in deposition that she had purchased the acreage in Ubly in November, 2004, for the purpose of building a residence on it. She had not decided whether she was actually going to farm it. She decided to erect a steel barn, and purchased the materials for it on December 8, 2004, which were then delivered on March 9, 2005. Plaintiff stated the structure was not intended for residency purposes, rather as a barn. Plaintiff stated she had no time schedule as to when the barn was to be erected, but she did have a person in mind who could do the job for her.

According to her testimony, plaintiff had a conversation with her insurance agent after she purchased the property in Ubly in November, 2004. She was told that she would need a builder's risk policy on the property before she decided to start developing it, presumably because her homeowner's policy would not cover certain aspects of a building process on land other than that on which her primary residence stood. Plaintiff stated she did not get that additional coverage until after the accident had occurred. Plaintiff had architectural plans for the residence to be built on the property, with a date of March 2, 2005 as the "owner's approval" date, and March 23, 2005, as the completion date of the plans. Plaintiff stated she had first worked with the architect in December, 2004, for the plans for the residence she planned to build. Plaintiff stated she pulled permits for the sewer and septic in January or February, 2005. Plaintiff's understanding of when "construction began" was when the builders dug the hole and put the foundation in.

Plaintiff stated that when she purchased the Ubly property in November, 2004, it was not being farmed, it was just vacant acreage, but had been farmed the prior growing season by a neighbor across the street, the crops being corn and soy. Following the

accident, the neighbor approached plaintiff and requested use of the land again, on a rental basis, for the farming of crops. Plaintiff agreed, and the neighbor began planting during the planting season.

Applicable law as it pertains to Insurance Policies

The construction and interpretation of an insurance contract is a question of law for a court to determine. *Morley v Automobile Club of Michigan,* 458 Mich 459, 465; 581 NW2d 237 (1998). Whether contract language is ambiguous is also a question of law. Initially, in reviewing an insurance policy dispute the court must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles of contract construction. *Arco Industries Corp v American Motorists Inc Co,* 448 Mich 395, 402; 531 NW2d 168 (1995). First, an insurance contract must be enforced in accordance with its terms. *Upjohn Co v New Hampshire Ins Co,* 438 Mich 197, 207; 76 NW2d 392 (1991). A court must not hold an insurance company liable for a risk that it did not assume. *Auto-Owners Ins Co v Churchman,* 440 Mich 560, 567; 489 NW2d 431 (1992). Second, a court should not create ambiguity in an insurance policy where the terms of the contact are clear and precise. *Id.* Thus, the terms of a contract must be enforced as written where there is no ambiguity. *Stine v Continental Casualty Co,* 419 Mich 89, 114; 349 NW2d 127 (1984).

While the court construes the contract in favor of the insured if an ambiguity is found, *Auto-Club Ins Ass'n v DeLaGarza,* 433 Mich 208, 214; 444 NW2d 803 (1989), this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured. *Upjohn Co,*

supra at 208, n 8. The pertinent provisions of plaintiff's insurance policy covering her residence in Macomb state the following:

Under "Definitions" it states, "you" and "your" refer to the "Named Insured" [Nancy Brown] shown in the Declarations and the spouse [in this case, deceased], if a resident of the same household.

1. "Bodily injury" means physical bodily injury, sickness ...

* * *

5. "Insured" means you and residents of your household who are:
   a. your relatives; or
   b. under the age of 18 living on the residence premises continuously for longer than 30 days at the time of loss.

6. "Insured location" means:
   a. the residence premises;

* * *

   e. vacant land, **other than farmland**, owned by or rented or rented to an insured;
   f. land owned by or rented to an insured on which a one, two, three, or four family dwelling is being built as a residence for an insured;

Section II – Exclusions

1. Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to:
   a. bodily injury or property damage which may be the natural, foreseeable, expected, or anticipated result of the intentional acts of one or more insureds or which is in fact by one or more insureds, even if the resulting bodily injury or property damage is of a different kind, quality, or degree than initially expected or intended, or is sustained by a different person, entity, or real or personal property than initially expected or intended.

* * *

   f. bodily injury or property damage arising out of:
      (1) the ownership, maintenance, use, loading, or unloading of motor vehicles **or all other motorized land conveyances**, including mopeds and trailers;

(2) the entrustment by an insured of a motor vehicle or any other motorized land conveyance, including mopeds, to any person; or

(3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph 1.f.(1) or 1.f.(2), above.

Section II – Additional Coverages

1. Claim Expenses. We pay:
   a. expenses we incur and costs taxed against an insured in any suit we defend .... .

[Emphasis added.]

Defendant's Motion under MCR 2.116(C)(8) and (C)(10)

Defendant submits that it has denied coverage in part because the accident was an occurrence that is not covered under Section II, Exclusions, Coverage E, as shown above. Defendant maintains that the forklift used for the steel removal is a "motorized land conveyance." Further, defendant has denied coverage because the Ubly property was not vacant at the time of the accident, as the activity in which Burlingame and plaintiff's son were engaged constitute the development and/or start of construction on the land. Further, defendant submits it has denied coverage on the basis that there is or may be some question as to whether the Ubly land was vacant, as it is undisputed that the land in question had been farmed during the farming season prior to the accident, and again farmed following the accident.

In response, intervening plaintiff NationsRent submits that defendant's claims that coverage is excluded because the accident did not happen on insured property, and that the forklift was a "motor vehicle" or a "conveyance" are not sustainable. NationsRent states that defendant relies on Section II(1)(e) of exclusions, which states, "bodily injury

….. arising out of a premises." NationsRent is incorrect. Defendant denies coverage on the basis of Section II(1)(f) which provides "bodily injury … arising out of the ownership, … use, loading, or unloading of motor vehicles or all other motorized land conveyances …. ." NationsRent's arguments sound more in premises liability, and that is not what this claim is about, rather, put simply, the principal issue is with regards to a serious bodily injury sustained during the use of a motorized land conveyance on property other than plaintiff's insured residential property.

NationsRent also claims that the forklift was not a motor vehicle or conveyance, and emphasizes that the insurance policy fails to define either object. The fact that a policy does not define a relevant term does not render the policy ambiguous. *Auto Club Group Ins Co v Marzonie,* 447 Mich 624, 631; 527 NW2d 760 (1994). Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. *Group Ins Co of Michigan v Czopek,* 440 Mich 590, 596; 489 NW2d 444 (1992). NationsRent further argues that while the forklift is used to lift things, it is not designed to transport them, as that which is defined in the dictionary as a "conveyance" – a mechanism used for transportation. NationsRent states that the applicable policy section uses two specific examples as what a "motorized land conveyance" could comprise: a trailer and a moped. Again, NationsRent ignores the word "**including**" that means those objects are only two of several motorized vehicles used for transport. If the Court's understanding is correct, NationsRent attempts to exclude the forklift from the exclusions because it is not specifically named, preferring to put it in a category of "equipment" not referred to. "Equipment" or not, the Court is satisfied that it falls into the category of "all other motorized land conveyances."

The deposition of Matthew Gazecki, the person who rented the forklift to plaintiff stated that the 6,000 pound capacity vehicle has four tires, is powered by a diesel engine, is driveable, must have a driver to operate it, in the cab, in the seat; has a seat belt, has an accelerator pedal, a brake, a horn, has multiple steering functions, mirrors, is four-wheel drive, and capable of traversing most, if not all construction sites. It has a fuel capacity of 38 gallons. It is designed to be used to transport materials from point A to point B, by being driven. In addition, Mr. Gazecki agreed that the forklift could drive anywhere that it is permitted to be driven providing it has enough fuel. The Court is convinced that reasonable minds could not disagree that the forklift in question was a "motorized land conveyance." This is further demonstrated by the fact that the two young men using the forklift after the work was done used the vehicle as a land conveyance as they traversed about the property.

With respect to NationsRent's argument that the land on which the accident occurred was not farmland, again, the Court does not agree. Deposition testimony indicates that while at the time of the occurrence, the land was not producing crops only because it was out of season, as during both the growing seasons prior and after the incident the land was used for planting, producing and harvesting corn and soy. Clearly, reasonable factfinders could not disagree that the land was indeed, "farmland." "Farmland", by dictionary definition is, "land used or suitable for the practice of agriculture; that being the practice of cultivating the soil, producing crops, ... and in varying degrees the preparation and marketing of the resulting products." Merriam-Webster's Collegiate Dictionary (10^{th} ed. 2001). Further, as a given, Michigan's climate is not conducive of cultivating crops year-round, such that just because farmland lies

fallow for a season any deduction that would necessarily preclude it from being included in a definition of farmland would be disingenuous, at best.

NationsRent's other arguments are inapplicable as they pertain to the insurance policy at issue. It is irrelevant for purposes of the instant motion that plaintiff signed a document in which she agreed to "indemnify and hold NationsRent harmless from any and all suits, actions, proceedings", and so forth, as it has no bearing on what insurance coverage plaintiff carried for purposes of the instant motion. That is an issue between plaintiff and NationsRent, as the contract, or application for credit, was a matter unrelated to any exclusions in plaintiff's insurance policy, and was strictly between plaintiff and NationsRent. The Court is mindful that NationsRent's interest in plaintiff's insurance coverage is applicable so as to afford coverage as it pertains to the lawsuit now pending in Sanilac County.

If any exclusion in an insurance policy applies to a claimant's particular claims, coverage is lost. *South Macomb Disposal Authority v American Ins Co,* 225 Mich App 635, 653; 572 NW2d 686 (1997). The Court emphasizes that settled case law dictates that a court must not hold an insurance company liable for a risk that it did not assume. See *Churchman, supra.* This Court finds the language of the policy clear and unambiguous, and declines to interpret the language in the manner that NationsRent endeavors. The Court finds no genuine issue of fact that defendant insurance company is liable for the duties of which it is asked to fulfill due to the exclusions in the policy as discussed above, i.e., Section II(1)(f)(1) and (2), "all other motorized land conveyances", and the fact that the land had been, and continued to be, farmland during the growing seasons. Further, assuming that at the point in time the incident occurred, the land was

not being farmed, it was also no longer "vacant"[1], as the circumstances themselves establish that with the delivery of building materials, permits pulled for sewer and septic, architectural renderings approved by plaintiff, the construction process was beginning for the plaintiff's new residence and barn. And finally, as clearly stated on page 16, ¶ 6, "No action can be brought against [defendant], unless there has been compliance with the policy provisions." In this case, the policy provisions include exclusionary provisions which apply in this case.

It is for the above-stated reasons that Farm Bureau defendant's motion for summary disposition is GRANTED. With respect to intervening plaintiff NationsRent's motion for summary disposition, because it addresses the same arguments already discussed and decided in favor of defendant insurance company, NationsRent's motion for summary disposition is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last pending matter and this case is now CLOSED.

IT IS SO ORDERED.

Dated: June 15, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Douglas A. Tull
William L. Kiriazis
Gary W. Caravas
Neil A. Miller

DONALD G. MILLER
CIRCUIT JUDGE

JUN 15 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk

[1] As NationsRent properly points out, the "Builders Risk Coverage" policy would not necessarily include coverage for personal injury; rather, for loss and damage to fixtures, machinery, building materials and supplies for construction, and so forth. In the instant case, once building supplies were en route to the building site, a prudent person would acquire the Builders Risk Coverage insurance, in case of theft or damage.